

IN THE UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF ARKANSAS  
WESTERN DIVISION

UNITED STATES OF AMERICA,

Plaintiff,

v.

No. 4:15CV00181 JM

April 25, 2017  
Little Rock, Arkansas

UNITED PAIN CARE LTD  
and MAHMOOD AHMAD, MD,,

Defendants.

EXCERPTED TRANSCRIPT OF TRIAL  
(Closing Arguments and Jury Verdict)  
BEFORE THE HONORABLE JAMES M. MOODY, JR.,  
UNITED STATES DISTRICT JUDGE, and a jury

APPEARANCES:

On Behalf of the Government:

MS. SHANNON S. SMITH, Assistant U.S. Attorney  
MS. JAMIE GOSS DEMPSEY, Assistant U.S. Attorney  
U.S. Attorney's Office  
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Little Rock, Arkansas 72203-1229

On Behalf of the Defendants:

MR. TIMOTHY O. DUDLEY, Attorney at Law  
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Proceedings reported by machine stenography and displayed  
in realtime; transcript prepared utilizing computer-aided  
transcription.

1 [Excerpted here.]

2 \* \* \* \* \*

3 MS. SMITH: Thank you, Your Honor. This case is  
4 about taking responsibility, and I'm asking each of you to find  
5 that Dr. Ahmad and his pharmacy are responsible for the  
6 violations that occurred. This is my chance to get to take the  
7 facts and the evidence that you've heard from the witness stand  
8 and the pieces of paper that you've seen and sort of put those  
9 together with the law to tell you what our case is about.  
10 You've heard that diversion is a serious problem in Arkansas.  
11 You heard that from Investigator Conner, you heard it from  
12 Investigator Shortway. And because of that, the Controlled  
13 Substances Act and the DEA mandate a closed system when it  
14 comes to controlled substances. What you have to think about  
15 here is who made the choice to participate in that closed  
16 system. It was Dr. Ahmad.

17 He didn't have to open a pharmacy. He volunteered to  
18 open a pharmacy, he made the choice to participate in a closed  
19 system, and because of that, he has to abide by the regulations  
20 that are set forth in the laws. And he did not do that. Some  
21 of the things that the judge talked to you about is the burden  
22 of proof, and I just want to touch on that for a second. It's  
23 not beyond a reasonable doubt. This isn't a criminal case.  
24 But one of the things that the jury instructions said is that  
25 you decide by considering all of the evidence and deciding what

1 evidence is more believable. I ask you to use your common  
2 sense in this case when you're looking at the burden of proof.  
3 What makes sense here?

4 Some of the things that we don't have to prove to you is  
5 we do not have to prove to you that diversion actually  
6 occurred. We do not have to prove to you that those drugs  
7 actually got onto the street and that somebody used them and  
8 something occurred negatively with that person. We do not have  
9 to prove that. Moreover, the judge read to you that United  
10 Pain, LTD doing business as United Pharmacy has stipulated that  
11 they dispensed, delivered or otherwise disposed of controlled  
12 substances. So you will not have to decide that either. What  
13 you've got to decide is who is responsible. And Dr. Ahmad is  
14 responsible for this. Why should you hold him responsible?

15 Well, there's a common thread here, and what is that  
16 common thread? It's Dr. Ahmad. When he decided to open up  
17 this pharmacy, he listed himself as the incorporator and  
18 organizer as set forth in Exhibit 1 with the secretary of  
19 state. When he decided to open the pharmacy, it was Dr. Ahmad  
20 who filled out the application to operate a pharmacy. And we  
21 went through that, and that's Defendant's Exhibit 5, that he is  
22 the one who filled out the application. In that same  
23 application, he also certified that he would abide by all the  
24 laws to operate a pharmacy, and he signed it as the president  
25 because he is the owner of the pharmacy. Dr. Ahmad owns the

1 corporation, United Pain Care, LTD, and that owns the pharmacy.  
2 Dr. Ahmad owns the pharmacy.

3 Additionally, in order to operate a pharmacy, you must  
4 have a DEA registration. And who is it that applied to have  
5 the DEA registration for the pharmacy, Mahmood Ahmad. He is  
6 the one who was the registrant for the pharmacy. In order to  
7 have a pharmacy, you have to have drugs. So who did he enter  
8 into a contract with? In Plaintiff's Exhibit 27, he entered  
9 into a contract with Cardinal, who is a distributor, and when  
10 he did that, he agreed that this was his signature and within  
11 that contract, it says that Mahmood Ahmad will abide by all  
12 applicable laws, rules, regulations, ordinances, and guidances  
13 of Federal Drug Enforcement Administration. He has to abide by  
14 the laws that are set forth.

15 Also when he applied for the DEA registration, he is the  
16 one that paid for it. He used his credit card. When the  
17 pharmacy closed, who was it that surrendered their DEA  
18 registration? Was it the pharmacy? No. When he sold the  
19 pharmacy and surrendered his DEA registration to the pharmacy,  
20 who surrendered that? It was Dr. Ahmad. He is responsible.  
21 When we talk about the pharmacists, who hired the pharmacists?  
22 Dr. Ahmad. And Mr. Rinchuso got on the stand and basically  
23 admitted that he really wasn't even able to keep up with all of  
24 his paperwork. That in 30 years of being a pharmacist that  
25 he'd never had to do all this paperwork, it was the pharmacy

1 tech. That's what he stated. He stated he was a one man show  
2 when it came to the paperwork.

3 Who made the decision to hire someone who was not able to  
4 keep up with the paperwork? It was Dr. Ahmad. On that note,  
5 Mr. Rinchuso also testified that they had daily conversations,  
6 daily conversations when Dr. Ahmad would even come into the  
7 pharmacy and talk. So who is the common thread here? It is  
8 Dr. Ahmad. When we talk about responsibility and admitting it,  
9 Dr. Ahmad, after the close of the inspection and the audit,  
10 sent an e-mail to Kendall Shortway who is the lead investigator  
11 stating that, however, being the owner of the pharmacy any  
12 violations which are assessed against the pharmacy are  
13 ultimately applicable to the company, which I own, since the  
14 pharmacist is an employee. He admits he is responsible.

15 After the inspection, Inspector Shortway testified that  
16 they invited management to the meeting. And who came to the  
17 meeting to talk about the violations? Dr. Ahmad and  
18 Mr. Rinchuso. He is management. He owns the pharmacy. What  
19 else occurred? Dr. Ahmad, when he was on the witness stand,  
20 testified that he had each of his patients sign a contract that  
21 indicated that they would use one pharmacy and he testified  
22 that a majority of his patients used what pharmacy? His  
23 pharmacy. So he had a good thing going there. And  
24 Mr. Rinchuso also testified that of all the prescriptions that  
25 he filled while he was a pharmacist, a majority of them were

1 Dr. Ahmad's. He indicated he tried to set up a real pharmacy  
2 or some sort of wording like that and have flu shots, but the  
3 real deal was, Dr. Ahmad was writing the prescriptions and they  
4 were all going over to his pharmacy.

5 And when we talk about the theft report, there was a  
6 theft report that came into evidence where we talked about the  
7 drugs that went out. At this point, the theft occurred  
8 January 22nd of 2013, which is kind of right in the middle of  
9 the audit period that we're talking about. Mr. Rinchuso  
10 testified that when he listed all of these numbers down here  
11 for the drugs that had been stolen that night, that he had to  
12 rely on the computer because he didn't have the paperwork. At  
13 this point, even if Dr. Ahmad had stuck his head in the sand  
14 the whole time, at this point, he certainly knew that there was  
15 a problem, there were regulations that needed to be followed,  
16 and he needed to get that together. And he needed to tell his  
17 employees to get that together. Moreover, you also heard  
18 testimony that Dr. Ahmad has the DEA registration because he  
19 dispenses a drug called Suboxone out of his clinic as a  
20 physician.

21 As a physician dispensing Suboxone, you have to abide by  
22 the same regulations that the pharmacy does. Do not let him  
23 stick his head in the sand and ignore his responsibility. He  
24 chose to open this pharmacy, he chose to reap the benefits from  
25 it. Do not let him hide behind his corporation and not accept

1 responsibility for this. Both defendants are responsible for  
2 the recordkeeping violations that took place. So when you get  
3 back to the jury room, you're going to have two sets of what we  
4 call interrogatories. They're basically questions that you'll  
5 have to answer in order to reach your verdict. The first one  
6 I'll go over are for or against Dr. Ahmad.

7 The first one, remember that United Pain Care has  
8 conceded that they dispensed, delivered or otherwise disposed  
9 of controlled substances, so you won't have the same question  
10 with these. But as to Dr. Ahmad, you have to find from a  
11 preponderance of the evidence that defendant, Dr. Mahmood  
12 Ahmad, dispensed, delivered or otherwise disposed of controlled  
13 substances. Again, I ask that you use your common sense. So  
14 when you're looking at this, we've got to show that he did  
15 that. So when we talk about dispensing, I'm not trying to say  
16 that Dr. Ahmad marched over to the pharmacy, got out the pill  
17 bottles and scraped the pills into the bottle. I'm not saying  
18 that. But as the owner of the pharmacy, as the one who hired  
19 the employees who by their admission did not do a good job, he  
20 hired basically an incompetent pharmacist, and by causing his  
21 prescriptions to go over there and be filled, we have met our  
22 burden of proof.

23 MR. DUDLEY: Your Honor, I object to that. That's  
24 just a misstatement of the law. It goes against the ruling the  
25 Court made before we started.

1 THE COURT: Can y'all approach, please?

2 (Bench conference reported as follows:)

3 THE COURT: Mr. Dudley, I understand that she's  
4 arguing that the evidence satisfies that, but what exactly is  
5 the ruling that you're talking about? I just wasn't following.

6 MR. DUDLEY: You ruled that he's not responsible  
7 simply because he owns stock in the corporation and the  
8 pharmacy. She just argued that because he's the owner and he  
9 wrote prescriptions, he's dispensing drugs. There's no way in  
10 the world that's the law.

11 MS. SMITH: I didn't say he dispensed them, I said  
12 he caused them to be dispensed. If you want to argue that's  
13 separate and apart, you can.

14 THE COURT: I'm going to look back at the real time.  
15 Every time y'all talk, it resets and I can't scroll back so I'm  
16 going to ask y'all to stop for a minute. I don't read back  
17 that she said exactly that. But I could tell the jury that the  
18 mere owning of a corporation isn't sufficient. I think that's  
19 the ruling I made. I read back and she's basically arguing  
20 that if you open a pharmacy and you hire a pharmacist, that's  
21 dispensing and that's sufficient. I mean, I think that's  
22 different than the mere fact that if you have stock in a  
23 corporation, you're liable for the employees.

24 MR. DUDLEY: The whole purpose of that, Judge, is to  
25 have the people who actually handle the drug record the

1 transactions. There is no law that says hiring a pharmacy who  
2 dispensed drugs means you're dispensing drugs. That's just not  
3 the law.

4 MS. SMITH: May I respond?

5 THE COURT: Sure.

6 MS. SMITH: That is if that is what came -- that is  
7 not what I'm saying. I'm saying as the owner of the pharmacy,  
8 you are responsible for what goes on with the pharmacy. I  
9 think that -- I mean, we've talked about --

10 MR. DUDLEY: She's arguing respondeat superior  
11 because he was the owner of the corporation that owned the  
12 pharmacy and that's exactly the point you ruled on before we  
13 started this trial.

14 MS. DEMPSEY: I think also because -- sorry to jump  
15 in. Because she's referred to the evidence that he was writing  
16 majority of the prescriptions for the pharmacy, so he was  
17 causing prescriptions to be filled, therefore, go out.

18 MR. DUDLEY: If that's true, any doctor whose  
19 prescription was filled at that pharmacy would be a dispenser  
20 under the Controlled Substance Act and they're stretching it  
21 way beyond what the law will allow, Judge. I do request the  
22 Court to instruct the jury he cannot be held liable simply  
23 because he owned United Pain Care which owned the pharmacy.  
24 Because I think that's what she's arguing.

25 THE COURT: Okay. I can make that comment, but are

1 you requesting anything else? I mean, that's the first  
2 question is, is it objectionable. The second one is what do  
3 you want me to do it about it if I agree with you beyond that?

4 MR. DUDLEY: I want the Court to instruct the jury  
5 that the owner of a corporation who owns a pharmacy is not  
6 liable simply because of that status.

7 MS. SMITH: Am I allowed to say that he caused  
8 prescriptions to be dispensed? That was what raised the  
9 objection.

10 THE COURT: That's what I read back is that she's  
11 arguing that, and dispense is not defined is my problem. And  
12 the one perhaps *Robinson* case that you referred to dealt with  
13 an owner/operator and I don't have a case or anything to look  
14 at where you've got an owner and non-operator.

15 MR. DUDLEY: Judge, just take an example of some  
16 doctor other than Dr. Ahmad who wrote a prescription and got  
17 filled at that pharmacy. Is the Court saying that under the  
18 law, that doctor has dispensed drugs within the meaning of the  
19 Controlled Substances Act?

20 THE COURT: I'm not saying he's dispensed or not.  
21 I'm saying they're arguing that the evidence shows that he is,  
22 and I don't know what dispense means under this law. I'm not  
23 saying he did anything. I mean --

24 MR. DUDLEY: My problem though, Judge, is they're --  
25 I think this is meant -- this law was meant to cover folks who

1 actually handle the drugs. That's the closed system they argue  
2 about. Now they're going way outside of that and saying the  
3 doctor who writes the prescription is dispensing the drugs.  
4 Dr. Ahmad asked for permission to dispense drugs.

5 THE COURT: I know all the facts, I'm just trying to  
6 apply them to the lack of case law and the lack of definition  
7 in the regulation.

8 MR. DUDLEY: I understand.

9 MS. SMITH: May I respond just for the record?

10 THE COURT: Yes.

11 MS. SMITH: So this is analogous to if you go in,  
12 and we do have these cases, and the pharmacist, the techs,  
13 everybody in the pharmacy and the owners are typically held  
14 responsible. So let's say hypothetically in Dr. Ahmad's  
15 medical practice, he is billing and his biller is billing  
16 fraudulently, it's the same scenario. You're asking that the  
17 biller be held responsible and Dr. Ahmad be absolved, in the  
18 same situation.

19 MR. DUDLEY: The problem is you keep saying he's the  
20 owner. He's not.

21 MS. SMITH: Then I will say he's the owner of the  
22 company that owns the pharmacy.

23 MR. DUDLEY: You're saying he can be held liable  
24 because of that and the judge has already ruled he can't.

25 MS. SMITH: Your objection was when I said he caused

1 to be dispensed, so I'm asking the Court can I say he caused  
2 drugs to be dispensed?

3 THE COURT: I'm going to tell the jury that mere  
4 ownership in the corporation that owns the pharmacy is not  
5 sufficient to show negligence.

6 MR. DUDLEY: When I talk, we're not talking about  
7 negligence now, we're talking about dispensing. I would just  
8 say not sufficient to show liability.

9 THE COURT: Well --

10 MS. SMITH: I don't have the jury instruction in  
11 front of me.

12 THE COURT: You're talking about the interrogatory?

13 MS. SMITH: Yes, sir.

14 THE COURT: The question is whether or not an owner  
15 of a pharmacy without more, if you admit that the pharmacy  
16 dispensed as the owner, therefore, dispensed and I don't think  
17 it's defined.

18 MR. DUDLEY: Yes. United Pain Care dispensed.  
19 United Pain Care was the owner. I admit that. They're trying  
20 to go beyond that and say now the owner of the owner.

21 THE COURT: And I understand your point, but I don't  
22 know that since dispensed isn't defined in the regulation.  
23 We've gone around this tree and you understand my problem, but  
24 I don't understand how to instruct around that issue when I can  
25 say that ownership is insufficient to show negligence. That's

1 the vicarious part or piercing the corporate veil part which  
2 we've been talking about. But whether or not he's considered  
3 having dispensed because of his however layered ownership  
4 interest, I don't have anything to look to.

5 MR. DUDLEY: I'll take what you give me.

6 THE COURT: Okay.

7 MS. SMITH: Your Honor, am I able to say that he  
8 caused these prescriptions to be dispensed? Because he wrote  
9 them and then they were taken next door.

10 THE COURT: You can argue that the evidence shows  
11 that.

12 MS. SMITH: Okay. That's fine. Thank you.

13 THE COURT: I'm not sure that's correct, but I don't  
14 know what else to do with it.

15 (Proceedings continuing in open court at 9:32 AM.)

16 THE COURT: Ladies and gentlemen, what I'm about to  
17 tell you is not in the instructions, but it is a verbal  
18 instruction that I'm giving you. The mere ownership in the  
19 corporation that owns the pharmacy is not sufficient to show  
20 negligence. The mere fact that Dr. Ahmad owns the pharmacy in  
21 and of itself is not enough. You have to find some negligence  
22 beyond that to find in favor of the government against  
23 Dr. Ahmad. Go ahead, Ms. Smith.

24 MS. SMITH: Thank you, Your Honor. Back to the  
25 interrogatory. I've gone over a whole list of things that

1 Dr. Ahmad did, other than just owning the corporation that  
2 owned the pharmacy. And I submit to you that by opening up the  
3 pharmacy and writing -- I believe Mr. Rinchuso testified  
4 writing 90 percent of the prescriptions that were filled there,  
5 that he caused those controlled substances to be dispensed,  
6 delivered or otherwise disposed of. So when you go back to the  
7 jury room, that's the first question you have to answer as to  
8 Dr. Ahmad. And if you answer yes to that question, then you're  
9 going to move on to all of the violations. If you answer no to  
10 that question, you can throw these away. These questions that  
11 I'm going to go over, which are all of the violations that  
12 we've covered extensively with Ms. Shortway, are also applied  
13 to United Pain Care, so I won't go through them twice.

14 Ms. Shortway testified about the DEA 222 forms. That's  
15 what this triplicate form is. It is an order form. She also  
16 testified that when you have a DEA 222 form that it has to be  
17 properly annotated. And as the jury instructions set forth,  
18 the Court has done a great job of explaining which exhibits  
19 they refer to. So when you take this verdict form back, you  
20 can pull out Exhibit 11 and look to see what the United States  
21 alleges is missing. It is missing the date received and the  
22 quantity. And for that reason, that is a violation. Then as  
23 you go to the next interrogatory, that's going to be for  
24 Exhibit 12 and 13, we are actually proving that something did  
25 not exist, so there was no DEA 222 form for these particular

1 drugs.

2 So there was testimony as to Exhibit 12 that this invoice  
3 shows that Schedule II controlled substances were ordered.

4 When you have Schedule II controlled substances, you must have  
5 a DEA 222 and that is referenced in Exhibit 12 and that is also  
6 covered in the jury instruction. Then we move to what was also  
7 not present. It was a DEA 222 order form for Exhibit 13. And  
8 Exhibit 13 was a statement that referenced an invoice where  
9 Schedule II controlled substances were ordered, and there was  
10 no form that's required. Then we move on to Exhibit 14.

11 Excuse me, 8.

12 We move to Exhibit 8 which was the computation chart  
13 which you'll have all of the backup documentation for this.  
14 But it shows that there were overages and underages of 10 of 11  
15 drugs. So when you go back to that jury verdict form, then you  
16 are going to have the opportunity to check whether there  
17 were -- they were properly maintained or weren't for each drug  
18 that the judge read off. Then as we go to the invoices, you  
19 have a big stack of invoices, and the example that I'm using  
20 just for closing is this one, and for every invoice in our  
21 summary which is also in the jury instructions, there is 102  
22 invoices that were not dated, and Investigator Shortway  
23 testified that that is necessary to show when these drugs came  
24 in.

25 So at the close of your deliberations, you're going to be

1 deciding whether there were these violations, and you've got to  
2 decide whether there were 115. For you note takers, I said 117  
3 at the beginning. That was my error. There's 115 violations.  
4 And the United States is asking you to find Dr. Ahmad liable  
5 and United Pain Care LTD doing business as United Pharmacy.  
6 Thank you.

7 MR. DUDLEY: Your Honor, can I turn this podium  
8 around?

9 THE COURT: If you can.

10 MR. DUDLEY: May it please the Court, members of the  
11 jury, I've been trying lawsuits for 35 years and I love what I  
12 do. I love trying lawsuits, I love arguing, I love the give  
13 and take of back and forth that occurs between lawyers when  
14 you're trying suits. One of the things that frustrates me to  
15 death though is when a lawyer isn't straight up with the jury  
16 on what the evidence has been and what the law is. And  
17 Ms. Smith has not been straight up with you on what the  
18 evidence is and what the law is. She wants you to hold  
19 Dr. Ahmad liable for these recordkeeping errors because he  
20 owned stock in a corporation which owned the pharmacy. And the  
21 judge just told you that's not the law. He cannot be held  
22 liable simply because he owns stock in a corporation that owned  
23 the pharmacy.

24 That would be like saying I'm a stockholder in Walgreens  
25 so if a Walgreens pharmacist makes a recordkeeping error, I'm

1 responsible for it. That's what their argument is. It's silly  
2 and it's not the law, and you argue silly things and you ignore  
3 the law only when you don't have the facts and the law on your  
4 side. She argued -- let me just list what she said -- he  
5 incorporated and organized United Pain Care. Yeah, he did.  
6 Now, they're going to get to get back up here when I'm through.  
7 I'm going to ask them to do this. If there's anything in the  
8 law the judge told you that says that makes him liable for  
9 recordkeeping violations, point out to us what it is because  
10 there ain't nothing in there that says that.

11 She says he completed the application for the  
12 pharmaceutical license. Actually he signed the application as  
13 president of United Pain Care. He didn't do that individually.  
14 You can look at it and see. But even so, if there's something  
15 in the judge's instructions that says he can be liable for  
16 these recordkeeping violations because he signed the  
17 application as president of UPC, point it out in the  
18 instructions where it says that. Because it ain't there. She  
19 said he's the owner of the pharmacy and they fed that all  
20 through this case, he's the owner of the pharmacy. He is not  
21 the owner of the pharmacy. He is half owner of United Pain  
22 Care which is a corporation which is a totally separate entity  
23 from Dr. Ahmad. Again, when we go back to the Walgreens,  
24 that's like saying because I own stock in Walgreens, I'm the  
25 owner of the pharmacy that Walgreens operates. Not true. It's

1 not the law.

2 You won't see anything in these instructions that the  
3 judge gives you that says that's the law, so number one, he's  
4 not the owner and number two, even if he was, the judge told  
5 you that's not sufficient to prove his liability in this case.  
6 She says he was a registrant of the pharmacy. If you remember,  
7 I questioned Ms. Shortway about that. Who was the registrant  
8 for this pharmacy. And she says it's always the pharmacy. And  
9 if you look, we've gotten evidence registration, it says  
10 registrant, United Pharmacy. But they still want to say he's  
11 the registrant of the pharmacy. Their own records, the DEA's  
12 own records contradicts that.

13 If you're being fair with the evidence, you don't get up  
14 here and tell the jury something that the DEA's own records  
15 contradict. You only do that when you're stretching. She said  
16 he hired the pharmacists. He did. But, again, if there's  
17 anything in the law the judge gave you that says that's a basis  
18 for holding him responsible for any recordkeeping violation,  
19 please point it out. When they get back up here, I'm going to  
20 ask them point out where in the law the judge gave you that  
21 says he can be held responsible because he hired the  
22 pharmacist. Let's talk about what the law really is and what  
23 they really have to prove. The instruction on liability is  
24 Court's Instruction Number 6. It tells you on the second page  
25 of the instruction what they have to prove. I'm -- the judge

1 also told you an instruction that you'll get that you got to  
2 consider these defendants separately. It's like there's a  
3 separate case against each defendant, so I'm going to talk  
4 about them separately.

5 Let's talk about Dr. Ahmad first. The judge told you  
6 that the government must prove by the greater weight of the  
7 evidence each of the following two elements. They got to prove  
8 two things against both defendants. One is that Dr. Ahmad  
9 dispensed, delivered or otherwise disposed of controlled  
10 substances. Now, I asked Ms. Shortway straight out, Did you  
11 ever see anything to indicate Dr. Ahmad ever dispensed any  
12 controlled substance? She said, No. Ever delivered any  
13 controlled substance? She said, No. Ever disposed of any  
14 controlled substance? She said, No. She gets up here and  
15 argues, oh, but Dr. Ahmad dispensed or caused controlled  
16 substances to be dispensed because he was the owner of the  
17 pharmacy.

18 Number one, we've already knocked that in the head. Or  
19 number two, he wrote prescriptions that went to the pharmacy  
20 that caused the pharmacy to dispense the medicine. What do you  
21 think dispensed means, particularly when we're talking about  
22 controlled substances? Remember Dr. Ahmad wanted to dispense  
23 medication, controlled substances in his medical practice, and  
24 he went to the state board and requested permission to be  
25 allowed to do that and they denied him permission to do it. So

1 he could not dispense drugs, controlled substances, in his own  
2 medical practice. What does that mean? He could not give  
3 drugs, he could not hand drugs to a patient to be taken out of  
4 the office to be consumed somewhere else.

5 The medical board said he can't do that and now they want  
6 to argue that because he writes a prescription that's filled at  
7 the pharmacy, he's causing the dispensing of drugs. He is  
8 causing the dispensing. He's causing the pharmacist to hand  
9 the drugs over, but that's not what dispensing means.

10 Dispensing means you hand it over. Dr. Ahmad didn't hand over  
11 any drugs. If they're correct in that interpretation, then any  
12 doctor who wrote a prescription that's filled at that pharmacy  
13 dispensed drugs. That's not true. It ain't right. It's a  
14 made-up argument, and there's -- their own witnesses admit they  
15 got no evidence that Dr. Ahmad dispensed drugs, and then they  
16 want to get up here and argue against what their own evidence  
17 showed. That's stretching.

18 So there's certainly no evidence in this record and their  
19 witnesses admitted there's no evidence that Dr. Ahmad ever  
20 dispensed any drugs. That ought to put the end to the case  
21 against Dr. Ahmad. So let me talk about United Pain Care.  
22 Now, I admit and I've stipulated that United Pain Care  
23 dispensed drugs. United Pain Care is a corporation, but a  
24 corporation only acts through its employees, and the pharmacist  
25 here dispensed drugs so that means United Pain Care dispensed

1 drugs. I ain't arguing that. I agree they did it. But that  
2 doesn't end the inquiry. The second thing that they have to  
3 prove, and again, I'm going to go back to the judge's  
4 instructions on the two elements. One, for United Pain Care,  
5 they dispensed drugs, and I admit they did. And two, that  
6 United Pain Care refused, I'm going to separate this because  
7 there's two elements here.

8 Said refused to keep the required records. No evidence  
9 of that. They don't even argue that. They kept the records.  
10 Or if they didn't refuse to keep it, negligently failed to keep  
11 the required records. Now, I asked you in opening statements  
12 to please pay attention to see what evidence of negligence was  
13 presented against the pharmacy. I did that for a reason. What  
14 the government argues is some of these records were incorrect,  
15 and because the records were incorrect, the pharmacy is liable.  
16 But they're missing something.

17 They don't have to just prove that the records were  
18 incorrect. They did prove some records are incorrect, I admit  
19 that. But that's not all they have to prove and that's what  
20 they want to argue is the records are incorrect so they're  
21 liable. No. The records are incorrect because the pharmacy  
22 acted in a negligent manner. That's what they have to prove.  
23 What did she tell you in closing argument that the pharmacist  
24 did that was negligent? What did she tell you about what  
25 negligence caused these records to be wrong? I didn't hear a

1 word. What witness from the witness stand testified that  
2 something was done that caused -- something negligent was done  
3 that caused these records to be incorrect? I didn't hear  
4 anybody say a word. So how do you determine that it was  
5 negligence that caused the errors in the records?

6 The judge told you that negligence is the failure to  
7 exercise ordinary care. And ordinary care is the care a  
8 reasonable person would exercise under the same or similar  
9 circumstances. Well, in this case, the records were kept by a  
10 pharmacist. And the testimony was, I think, from both the  
11 government and defense witnesses, the testimony was that the  
12 pharmacists keep these records and that's just a normal way  
13 things are done. Pharmacists keep the records for controlled  
14 substances. So to determine whether the pharmacist in this  
15 case was negligent in the way he kept those records and that  
16 negligence caused the error in the records, wouldn't they have  
17 to show the way a pharmacist normally keeps the records, how a  
18 pharmacist, what kind of ordinary care a pharmacist normally  
19 uses, and then show that the pharmacist in this case deviated  
20 from that standard?

21 Is that the only way they could show that the pharmacist  
22 failed to exercise ordinary care? Did you hear anything like  
23 that? It's not fair. And it's not following the law to say  
24 the pharmacist is responsible because there was an error in the  
25 records. That's not what the judge told you. It's not what

1 the government has to prove. The government has to prove  
2 negligence. So let's talk a little bit about the records  
3 themselves, and I'm not going to bore you with a whole lot of  
4 conversation on this, but let me talk to you a little bit.

5 One of the charges is there was -- I think they claim  
6 there were two DEA form 222s missing. Number one, I asked  
7 Ms. Shortway when she was on the stand, Did you look in the DEA  
8 record to see whether they had those forms? No, she didn't.  
9 So we don't know whether those forms were prepared and sent to  
10 the DEA and the pharmacist's copies were misplaced or lost.  
11 Could it mean that those DEA forms got put in the wrong file at  
12 the pharmacy, that they fell down behind the file cabinet, that  
13 they were stolen in a burglary? Why are they missing? We  
14 don't know. If you don't know why they are missing, how can  
15 you find the fact that they are missing is negligent? They've  
16 got to show you that those forms are missing because of some  
17 negligence on the part of some employee of the pharmacy, and  
18 there's not a scintilla of evidence of that.

19 They also say that there is one DEA form 222 that is  
20 inaccurate. And she said what it was, and I'm sorry, I don't  
21 remember. I don't remember what the inaccuracy on the form is.  
22 I think it was missing a quantity. So if she's right, and I  
23 think she probably is, the record was inaccurate. But that's  
24 not enough. They've got to show some negligence, some act or  
25 failure to act on the part of the pharmacist that caused that

1 record to be inaccurate. There's not a word of testimony in  
2 this case about why the record was inaccurate or what caused it  
3 to be inaccurate. Could it be normal for a busy pharmacist,  
4 the pharmacist technician to fail to write down the number  
5 which is what she's saying?

6 Could that happen without anybody being negligent? If it  
7 could happen without anybody being negligent, is that what  
8 happened in this case? Do we know? Who's got the burden of  
9 proving that? They do. And they haven't given you any proof  
10 on it. They say there were 102 invoices that don't have the  
11 date and time on them, the date and time they were received.  
12 You know, they have the invoices, invoices are dated.  
13 Mr. Rinchuso testified that he put that information into their  
14 computer system so the computer system would show the date and  
15 time. Or the date, I don't know if it showed the time, the  
16 date that those controlled substances were received by the  
17 pharmacy. So all of the information the DEA requires was  
18 there. And they're saying hold the pharmacy liable because he  
19 didn't put in his own handwriting on the invoice the date  
20 received.

21 Well, you know, that may well be a technical violation of  
22 the DEA regulations, but is that really negligence when all the  
23 information is there and available to the DEA? The fact that  
24 he did not handwrite the date on an invoice is negligence?  
25 That seems a stretch to me. I can easily envision a pharmacist

1 who receives drugs and got a stack of invoices that goes  
2 through there and has to go fill a prescription, forgets to  
3 come back and write the date on the invoice. I don't think  
4 that's negligence. That's what people do. People forget,  
5 people make mistakes. That doesn't mean somebody's at fault  
6 because there's not a handwritten date on an invoice.

7 So I ask that you be fair with the evidence, apply that  
8 evidence to the law the judge gave you, and look at what they  
9 have to prove and determine whether or not they proved it.  
10 Because I submit they ain't even come close. This ain't even a  
11 close case. I ask you to find, one, that Dr. Ahmad never  
12 dispensed, delivered or disposed of controlled substances. I'm  
13 not even talking about negligence on his part. He didn't keep  
14 the records. How could he negligently keep the records when he  
15 never kept them at all? There's just no evidence on either  
16 element they have to prove against Dr. Ahmad.

17 And on the pharmacy, United Pain Care, again, I admit  
18 they dispensed drugs, but there is no evidence that they kept  
19 the records in a negligent manner or that they acted  
20 negligently and that's what caused the errors in the record.  
21 We ask that you find on the interrogatories that there was no  
22 negligence on the part of either defendant and that Dr. Ahmad  
23 never dispensed drugs. Thank you.

24 THE COURT: Ms. Smith.

25 MS. DEMPSEY: Ladies and gentlemen, thank you for

1 your time the last two days. I know we've gone kind of quick,  
2 we've looked at a lot of stuff, and I appreciate your time  
3 being here. Without you, we couldn't have this trial. So I  
4 agree with Mr. Dudley that he's been doing this a long time and  
5 I also don't doubt that he loves what he does, but I disagree  
6 that the evidence and the law has been misrepresented by  
7 Ms. Smith and myself. And I want to explain to you why and I  
8 want to remind you that only the judge can instruct you on the  
9 law and you're going to have those instructions with you when  
10 you go back to the jury room to deliberate.

11 First, Dr. Ahmad does not merely own stock in the  
12 pharmacy. He is a doctor with a pain practice and he wanted to  
13 open a pharmacy. He could not dispense the drugs himself, the  
14 medical board said no, and so he said what I will do is go open  
15 a pharmacy. He did that voluntarily. He set up the pharmacy  
16 as a corporation and he told you on the stand his wife has  
17 nothing to do with it. He paid for the DEA registration for  
18 the pharmacy and he signed the agreement with Cardinal Health  
19 to distribute drugs. He knows that drugs are going out of  
20 there because he's writing the prescriptions and sending them  
21 over there and the pharmacist is filling them. He hired the  
22 pharmacist.

23 And the pharmacist testified he talked to Ahmad every  
24 day, sometimes twice a day, and that Dr. Ahmad prescribed the  
25 majority of the drugs being dispensed at one time, 97 percent

1 of the prescriptions. As to the negligence, you heard  
2 Mr. Rinchuso testify himself. In 30 years, he's never been  
3 required to do paperwork. Somebody else always handled that.  
4 He didn't know what he was doing and if he was keeping up with  
5 it on the computer, he was not keeping up with it on paper. He  
6 said he tried but he couldn't. He said he could not say he did  
7 every single time. And with respect to the theft, he said he  
8 had to rely on the computer. If he had had accurate records in  
9 January of 2013, he should have been able to explain how many  
10 drugs were missing exactly. He couldn't.

11 As to the violations, the DEA 222, the pharmacy is  
12 required to keep a copy for two years. The pharmacy is not  
13 supposed to send a copy to DEA. They were required to keep one  
14 and they didn't have it. As far as the DEA 222 that was not  
15 annotated, remember that the DEA 222s are for Schedule II  
16 controlled substances: Your oxycodone, your hydrocodone. You  
17 can't order those drugs without that form. That's why it's so  
18 important for the date and the quantity to be there. Those are  
19 the drugs that are most typically diverted, and when those  
20 forms are not annotated properly, that's bad for a pharmacist.

21 And as to the invoices, look at them yourself. You can  
22 see there's no dates, you can see whether they were checked in  
23 or signed, and I'd submit to you there's no evidence that the  
24 computer system showed anything was kept by when the dates came  
25 in. That information was not provided to DEA. It's important

1 to keep tabs on these drugs as a pharmacist because these are  
2 all controlled substances. So I thank you for your time and  
3 thank you.

4 THE COURT: Ladies and gentlemen, as you can  
5 imagine, there's rules you must follow when you go to the jury  
6 room to deliberate. First, you will select a foreperson and  
7 that person will preside over your discussions and speak for  
8 you here in court. Second, it is your duty as jurors to  
9 discuss the case with one another in the jury room and you  
10 should try to reach an agreement if you can do this without  
11 going against what you believe to be the truth, because all  
12 jurors have to agree on the verdict. Each of you must come to  
13 your own decision but only after you have considered all the  
14 evidence, discussed the evidence fully with your fellow jurors,  
15 and listened to the views of your fellow jurors. Don't be  
16 afraid to change your mind if the discussion persuades you that  
17 you should.

18 But do not come to a decision just because other jurors  
19 think it's right or just to reach a verdict. Remember you are  
20 not for or against any party, you are the judges, the judges of  
21 the facts, and your only job is to study the evidence and  
22 decide what is true. Third, if you need to communicate with me  
23 during your deliberations, send me a note signed by one or more  
24 of you, give the note to the courtroom security officer, and  
25 I'll answer it as soon as I can either in writing or here in

1 court. While you are deliberating, do not tell anyone,  
2 including me, how many jurors are voting for either side. I  
3 don't want to know where you stand.

4 Your verdict has to be based only on the evidence and the  
5 law that I give you in my instructions. Nothing I have said or  
6 done was meant to suggest what I think your verdict should be.  
7 The verdict is entirely up to you. Finally, the verdict forms  
8 are your written decisions in this case. I'm going to walk you  
9 through the verdict forms. So there are two sets of verdict  
10 forms. Everything that has to do with Dr. Ahmad has an A in  
11 front of it. I don't think you have a copy of the verdict  
12 forms there, but I'll give you one. So there's A1 through 7  
13 and those will be stapled separately. A stands for Ahmad,  
14 should be easy enough. They'll all be stapled together.

15 So the first interrogatory, A1, says, Do you find from a  
16 preponderance of the evidence that Dr. Ahmad dispensed,  
17 delivered or otherwise disposed of controlled substances? Your  
18 vote will be either yes or no. All of these have to be  
19 unanimous, all 12 of you must agree. Once that's decided, the  
20 foreperson will sign and date that form. Sense the government  
21 must prove two elements against Dr. Ahmad, if you answer no to  
22 A1, you're through with Dr. Ahmad. If you answer yes to number  
23 1, you must answer the remaining interrogatories.

24 And that note is down there at the bottom that says if  
25 you answer no to this interrogatory, you are done with this

1 set, meaning Dr. Ahmad's set, and you go on to the next set  
2 which is interrogatory UPC, or United Pain Care Number 1. See  
3 how we did that for you. Those are going to be stapled  
4 together. The first element is agreed to. Everyone agrees  
5 that a pharmacy dispenses drugs. That's what they do. So you  
6 don't have to go through that. You'll go through each  
7 interrogatory and determine whether or not either United Pain  
8 Care or Dr. Ahmad was negligent in each of the claims that we  
9 went through, and it will direct you to an exhibit number. So,  
10 for instance, in the first claim, it says, Do you find from a  
11 preponderance of the evidence that Dr. Ahmad refused or  
12 negligently failed to maintain an accurate DEA 222 order form  
13 for Schedule II controlled substances? And it refers you to  
14 Exhibit 11.

15 On each one of those claims, if you get past the first  
16 one on Dr. Ahmad, you must decide either yes or no on that  
17 claim. When you get to the last verdict form if you get that  
18 far on Dr. Ahmad, you have to decide that 102 times. And so  
19 for each one of the interrogatory number 8, it says if you've  
20 answered yes to interrogatory number A7, indicate by a check  
21 mark below which invoices you find were not properly annotated.  
22 So you must go through all of Exhibit No. 14 and determine each  
23 one of those invoices separately. That's the same way for  
24 United Pain Care's interrogatories.

25 Ladies and gentlemen, at this time we're going to gather

1 up the exhibits and get you a copy of the verdict forms back.

2 Raymond, can you be sworn?

3 (Courtroom security officer sworn).

4 THE COURT: If y'all will follow Raymond back to the  
5 room, the Court will get them together. I'm not sure where the  
6 verdict forms are, so I'll get those back to you as soon as I  
7 make sure I've got the right set.

8 (Jury exits the courtroom.)

9 THE COURT: I want to commend both sides for the way  
10 y'all tried this case. Y'all agreed to almost every exhibit,  
11 you had minimal objections, which reduces the opportunity for  
12 me to get reversed, which I appreciate. And both sides were  
13 well represented. I just wanted to say that before the verdict  
14 came back. Court's in recess till the jury returns unless  
15 y'all have got something else for the record. I'm going to  
16 send the defendant's book back, and we have 1 through 16 and --

17 MS. SMITH: And 27.

18 THE COURT: Yeah, 1 through -- did you fill in the  
19 middle between 1 through 6 and 11 through 16?

20 MS. SMITH: Yes. And here was the 27.

21 THE COURT: Y'all can just get together and find out  
22 which set of exhibits go back and as long as y'all can agree on  
23 them, we'll send them back. Thank you.

24 (Recess from 10:07 AM until 12:04 PM, jury present.)

25 THE COURT: Everyone be seated, please.

1 Mr. Finkelstein, has the jury elected a foreperson?

2 MR. FINKELSTEIN: Yes, Your Honor.

3 THE COURT: Are you that foreperson?

4 MR. FINKELSTEIN: Yes, sir.

5 THE COURT: Have y'all reached a verdict?

6 MR. FINKELSTEIN: Yes, sir.

7 THE COURT: Would you mind handing your verdict  
8 forms to Raymond, please?

9 I have two packages of correctly completed verdict forms.  
10 With regard to Dr. Ahmad, interrogatory A-1 reads: Do you find  
11 from a preponderance of the evidence that Dr. Mahmood Ahmad  
12 dispensed, delivered, or otherwise disposed of controlled  
13 substances? Verdict is: No. Dated 4/25/17, signed by Hugh  
14 Finkelstein. Is this the jury's verdict, Mr. Finkelstein?

15 MR. FINKELSTEIN: Yes, sir.

16 THE COURT: All right. The jury properly followed  
17 the instructions and didn't finish the rest of the  
18 interrogatories on that particular package.

19 On interrogatory number UPC-1, do you find from a  
20 preponderance of the evidence that defendant, United Pain Care,  
21 LTD, DBA United Pharmacy, refused or negligently failed to  
22 maintain an accurate DEA 222 order form for Schedule II  
23 controlled substances as set forth in Exhibit 11 as required by  
24 law? The answer is Yes, dated 4/25/17. And signed by  
25 foreperson, Hugh Finkelstein. Is that the jury's verdict?

1 MR. FINKELSTEIN: Yes, sir.

2 THE COURT: Mr. Dudley, the verdict is yes for the  
3 rest of them. Do you want me to read all of the verdict forms?

4 MR. DUDLEY: No, Your Honor.

5 THE COURT: Is it your verdict -- is it the jury's  
6 verdict, Mr. Finkelstein, of a finding of negligence on all of  
7 the claims of the government as set forth in your verdict  
8 forms?

9 MR. FINKELSTEIN: Yes, sir.

10 THE COURT: All right. Does the government wish to  
11 poll the jury?

12 MS. SMITH: No, Your Honor.

13 THE COURT: Do you, Mr. Dudley?

14 MR. DUDLEY: No, Your Honor.

15 THE COURT: Ladies and gentlemen, at this time I'm  
16 going to excuse you. If you'll wait just a second I'll come  
17 back and thank you officially and then I'll let you be about  
18 your business. Everyone please stand as the jury departs.

19 (Jury exits the courtroom.)

20 THE COURT: We'll make copies of the verdict forms.  
21 I guess we'll need to have the second phase tomorrow morning.  
22 But what does that do to the, not the subrogation claim, but  
23 the indemnification claim?

24 MR. DUDLEY: I don't think that affects it.

25 THE COURT: What do you mean? We'll still need one?

1 MR. DUDLEY: I think so. Well, that kind of depends  
2 on what kind of penalty you impose.

3 THE COURT: I understand that, whether or not it  
4 would be worth the time, but I was trying to work my mind  
5 around a company going after its employees, like a truck  
6 company got held responsible, the truck company go against or  
7 have a third party claim against its trucker as opposed to the  
8 doctor independently having that claim.

9 MR. DUDLEY: I hadn't thought about that and haven't  
10 researched it either, so I don't know the answer. I will say  
11 this. I think that moots the doctor's testimony in the penalty  
12 phase. He was going to testify about Dr. Ahmad's practice. I  
13 don't know how that has anything to do with penalty on the  
14 pharmacy.

15 MS. SMITH: Well, I think that's a good point,  
16 although I would -- may I think about that?

17 THE COURT: You can think about it. I'm aware of  
18 some of it generally. I'm not sure how probative it would be  
19 as to essentially -- I can't remember the guy's name --

20 MR. DUDLEY: Rinchuso?

21 THE COURT: Yeah, Rinchuso is basically the one who  
22 is the violator.

23 MS. SMITH: Under the -- I understand that. But I  
24 do -- under the harm to the public, that can be considered  
25 and --

1 THE COURT: But he's not a dispenser.

2 MS. SMITH: He is not, according to the jury's  
3 verdict. However, he is the one, all the prescriptions that  
4 were filled at the pharmacy were his.

5 MR. DUDLEY: I don't know that we need to argue  
6 this. I would ask if we can start at ten tomorrow.

7 THE COURT: Sure.

8 MS. SMITH: Let me think about it. But at this  
9 point, I'd like to plan to start if that's tomorrow and  
10 we'll --

11 THE COURT: We'll start at ten tomorrow, and go as  
12 long as we need to realizing I've got, between one and two, I  
13 have a kind of weird waiver and plea that I need to take care  
14 of.

15 MR. DUDLEY: I've probably got five minutes of  
16 testimony. I ain't going to take much time.

17 THE COURT: Just a little bit longer than your  
18 openings.

19 MR. DUDLEY: That's right.

20 MS. SMITH: Thank you.

21 THE COURT: All right.

22 (Proceedings adjourned at 12:10 PM.)  
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## 1 REPORTER'S CERTIFICATE

2 I certify that the foregoing is a correct excerpted  
3 transcript from the proceedings in the above-entitled matter  
4 held on April 25, 2017.

5  
6  
7  
8 /s/ Karen Baker, RMR, CRR, CCR  
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9 United States Court Reporter

Date: March 14, 2018

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Karen Baker, RMR, CRR, CCR  
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